

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of:) Art Unit: 1645
)
NIELSEN, Jan Clair) Examiner: GANGLE, B.
)
Serial No.: 10/562,421) Washington, D.C.
)
Filed: May 17, 2006) April 5, 2010
)
For: INITIATION OF) Docket No.: NIELSEN=6A
FERMENTATION)
) Confirmation No.: 5536

PETITION UNDER 37 CFR 1.181 FOR SUPERVISORY REVIEW
AND TO WITHDRAW FINALITY, ETC.

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S i r :

1. Pursuant to 37 CFR 1.181 (hence, a no-fee petition), applicant hereby petitions the Commissioner to exercise supervisory review and withdraw the finality of the rejection on the ground that it is premature under MPEP 706.07(a), that is, because "the examiner introduces a new ground of rejection that is necessitated neither by applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 1.97(c)...." The new grounds of rejection that render finality premature are as follows:

A. Indefiniteness rejection (p. 10) for lack of antecedent basis for "said grape juice"; term found in original claim 34.

B. Indefiniteness rejection (p. 10) for "Oenococcus family and Lactobacillus family" in claims 66 and 82; term found in those claims as they appear in the IPE claims set and the May 17, 2006 amendment.

C. Indefiniteness rejection (p. 10) of claim 79 for "concentration" language found in that claim as amended by the

May 17, 2006 amendment.

D. Indefiniteness rejection (p. 11) of claim 80 as lacking antecedent basis for "the fermentable compound" language found in that claim in the IPE claims set and the May 17, 2006 amendment.

2. Also, we note that while the amended claim 1 terminology "essentially complete degradation of the malic acid within the medium" is new, the examiner errs in stating that applicant failed to cite basis. There is extensive discussion of the teachings concerning malic acid degradation at pp. 24-27 of the November 5, 2009 amendment, including citation to original claim 8 ("capable of degrading at least 90% of said malic acid"), P16, L27-30 (initial malic acid content, point (11) on page 26 of the amendment), P17, 12-20 (minimum malic acid degradation expressed as final concentration, point (15) thereof), and P15, L22-32, (degradation as %, points (5) and (6) thereof).

Also, note that on page 27, lines 1-5 of that amendment we explain that "essentially complete" in the claim is considered to be when the fermentation is defined by the specification "to be completed", i.e., the malic acid level is not more than 30 mg/L, citing P15, L13-16.

All of the above analysis was completely ignored by both the new written description rejection stated in the last full paragraph on page 9, and by the new first indefiniteness rejection stated on page 10. This is in violation of the principle stated by 37 CFR 1.104(b) that the action should be "complete". MPEP 707.07(g) states that "piecemeal examination should be avoided as much as possible" and that "where a major technical rejection is proper, it should be stated with a full development of reasons rather than by a mere conclusion coupled with some stereotyped expression".

A "full development of reasons" surely requires rebuttal of basis already adduced by applicant.

This is a further reason for withdrawing finality, and indeed for also requiring the examiner to supplement the February 5 action and restart the period for response, or for vacating the February 5 action and requiring the examiner to prepare a new, more complete, nonfinal action.

Respectfully submitted,

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